

# **Exhibit 7**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

v.

10-cr-219-WMS-HKS

TONAWANDA COKE CORPORATION, et al.

Defendants

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## **AFFIDAVIT**

State of New York     )  
                                  )ss.:  
County of Erie         )

JAMES G. STRICKLAND, being duly sworn, deposes and states that:

### **BACKGROUND**

1. I am employed with the New York State Department of Environmental Conservation ("NYSDEC") as the Regional Engineer in the Department's Region 9 office, located at 270 Michigan Avenue, Buffalo, New York. I have been employed with the NYSDEC for approximately 30 years and worked in the position of Regional Engineer for the last two years.

2. I am aware of the facts and circumstances of the criminal conviction and the sentencing memoranda submitted by the United States, Tonawanda Coke Corporation and Mark L. Kamholz. Except as otherwise noted, I have personal knowledge of the facts set forth in this document as the Region 9 Regional Engineer, through which I oversee the various environmental

quality programs, including the Division of Air, Division of Environmental Remediation and Division of Water.

3. I submit this Affidavit in response to the sentencing memorandum submitted by defendant Tonawanda Coke Corporation as well as to provide the Court with information on Tonawanda Coke Corporation's operations at its coke manufacturing facility located at 3875 River Road, Tonawanda, New York ("Facility") as it relates to compliance with federal and state environmental laws and regulations following the issuance of the verdict on March 28, 2013.

**Opinions of Former Employees do not Form the Basis of an Agency's Position**

4. The sentencing memorandum submitted by the Tonawanda Coke Corporation inaccurately portrays the relationship between the NYSDEC and the corporation with its statement that the Tonawanda Coke Corporation has earned a reputation with the NYSDEC as "...an excellent coke battery operator which was responsive to environmental compliance issues when raised by the regulators." *See* Sentencing Memorandum on Behalf of Tonawanda Coke Corporation, page 4. As an example of this statement, Tonawanda Coke Corporation references opinions made by two retired NYSDEC employees, Henry Sandonato and Gary Foersch.

5. Mr. Sandonato expressed that view several years after his retirement when contacted by the NYSDEC as part of the investigation of the criminal charges and was not called by the defendants as witness at trial. A personal opinion of a former NYSDEC employee does not reflect NYSDEC's position.

**Defendant Mark Kamholz Remains the Environmental Control Manager  
at the Tonawanda Coke Corporation**

6. Tonawanda Coke Corporation's sentencing memorandum also incorrectly states that the company made personnel changes to ensure that defendant Mark Kamholz is not responsible for daily oversight and control of the company's environmental compliance.

7. The Tonawanda Coke Corporation recently submitted to the NYSDEC its revised Best Management Practices plan, dated August 2013, which lists Mr. Kamholz as the company's "Manager Environmental Control."

8. Further, during the NYSDEC's September 11, 2013 inspection of the Facility, NYSDEC staff was accompanied by Mr. Kamholz, along with two other Tonawanda Coke Corporation employees. Mr. Kamholz, however, was the point person to answer the majority of NYSDEC staffs' questions and he provided the requested information with respect to the environmental issues raised during that meeting.

**Inaccurate Representation of the Status of the Remedial Work  
at the State Superfund Site**

9. The Declaration of Rick W. Kennedy, dated September 13, 2013, submitted as Exhibit 2 of the Sentencing Memorandum on Behalf of Tonawanda Coke Corporation, also inaccurately portrays the status of the remedial work at the listed New York State inactive hazardous waste site located on Tonawanda Coke Corporation's property across the road from the Facility, referred to as Area 108 (OU3). Not only has the NYSDEC not reached an agreement on the particulars of the remedial program for Area 108 (OU3), let alone an implementation schedule, as stated in the Tonawanda Coke Corporation's sentencing

memorandum and Mr. Kennedy's Declaration, but Tonawanda Coke Corporation ordered its consultants to stop all negotiations and work at this listed superfund site.

10. Mr. Kennedy's Declaration also contains several erroneous statements regarding the two other listed hazardous waste sites located on the Facility's grounds, referred to as Areas 109 (OU2) and 110 (OU1), which necessitate correction.

11. Paragraphs 18 and 22 incorrectly state that the remedial determination issued by the NYSDEC for Areas 109 (OU2) and 110 (OU1) was "no further action," which implies that remedial work was performed on those parcels. Rather, since exposures to the soil contamination found at the site are limited to facility workers and trespassers, the remediation was deferred. Consequently, no remedial work is required at this time but remedial options will be evaluated for this site if the future use of the site is industrial but the manufacturing activities are different from the current coke production activities. In the meantime, Tonawanda Coke Corporation is required to maintain certain institutional controls as a protection from the contamination.

12. Similarly, the last sentence of paragraph 18 incorrectly states that the NYSDEC and New York State Department of Health have determined that the remedial work performed at Areas 109 (OU2) and 110 (OU1) are sufficient. As noted above, the Tonawanda Coke Corporation has not performed any remedial work at those two sites so neither agency made such a determination.

13. The NYSDEC disagrees with the statement in paragraph 20 of Mr. Kennedy's Declaration that "[i]t is highly unlikely any on-site activities would have affected the quality of

any permanent groundwater beneath the Facility” due to the presence of the clay aquitard.

Depending on the nature of the on-site activities, NYSDEC believes there is a strong likelihood that such activities would impact the groundwater.

14. Paragraph 20 of Mr. Kennedy’s Declaration also incorrectly states that only low levels of poly-aromatic hydrocarbons (“PAHs”) were detected. Rather, the level of PAHs detected exceeded the NYSDEC’s cleanup standards for restricted industrial use. The NYSDEC also disagrees with Mr. Kennedy’s further assertion in that paragraph that PAHs readily absorb to soil particles, eliminating the possibility of migration and therefore rendering the presence of those contaminants as a non-significant threat to the environment. Rather, the NYSDEC is of the opinion that the level of PAHs in the surface soils pose an exposure threat to the Tonawanda Coke Corporation employees and any individuals who may trespass onto the site.

15. Paragraph 20 of Mr. Kennedy’s Declaration further incorrectly states that the presence of the clay aquitard greatly restricts lateral groundwater migration, the groundwater movement throughout the Facility is negligible and that groundwater contamination does not migrate off-site. To the contrary, it is documented that groundwater does migrate off-site to adjacent properties.

16. The NYSDEC is not able to opine at this time as to the accuracy of the statement in paragraph 20 of Mr. Kennedy’s Declaration that the chemical substances in the groundwater are insignificant given the lack of additional information necessary to determine the location of the areas that are referenced in that section. It should be noted, however, that the investigation documents demonstrate that certain monitoring wells showed some level of contamination.

17. Mr. Kennedy also incorrectly states in paragraph 20 of his Declaration that no chemical substances were found to have left the Facility via surface water pathways to the Niagara River or adjacent properties. To the contrary, sediment contamination is documented in the embayment area located in the Niagara River adjacent to Area 108 (OU3).

18. The NYSDEC also disagrees with Mr. Kennedy's assertion in paragraph 20 of his Declaration that neither atmospheric dispersion, surface water runoff, nor groundwater migration are viable transfer mechanisms. To the contrary, each pathway is a viable mechanism for the transfer of the detected contamination from one location to another.

19. The NYSDEC is not able to opine at this time as to the accuracy of the statements set forth in paragraph 21 of Mr. Kennedy's Declaration since the reference to the coal storage area is not clear to the agency.

**Recorded Benzene Emission Reductions are Due to Required  
Facility Modifications and not Dispersion**

20. Another item requiring clarification is the letter submitted by Tonawanda Coke Corporation's consultant, Conestoga-Rovers & Associates ("CRA"), attached as Exhibit 9 of the Tonawanda Coke Corporation's sentencing memorandum. That document provides the findings of CRA's analysis of the benzene air quality data collected by the NYSDEC in Tonawanda, New York. For the reasons noted below, the NYSDEC disagrees with CRA's overall assertion that there is a one-on-one inverse relationship between the monitored benzene concentrations and wind speed.

21. CRA's analysis is based on simplistic assumptions about dispersion (that benzene concentrations are dependent only on wind speed) and does not include other parameters

necessary in evaluating monitoring data. An analysis of the concentrations of an air pollutant downwind of a source should include important parameters such as the emission rate of the pollutant, the dispersion rate of the plume, the rate at which the plume expands, wind direction and the distance from the emission source.

22. It is important to note that the NYSDEC was not able to confirm all of the data values used in CRA's analysis and was not able to replicate its analysis since CRA failed to provide a thorough description of the method for its calculations. In addition, NYSDEC's analysis of the shutdown of the light oil recovery system ("LO") and removal of the pressure relief valve ("PRV") from service (the two operational events used in CRA's analysis) found values for both benzene concentration and wind speed averages that differed from what CRA calculated. For the LO shutdown, NYSDEC's attempted recreation of CRA's analysis, as well as staff's use of NYSDEC's properly processed dataset, indicates that the post-LO shutdown average concentration was roughly half of the pre-LO shutdown average concentration. In addition, the wind speeds during both the pre-LO and post-LO shutdown were roughly the same, contrary to CRA's assertion. Accordingly, NYSDEC disagrees that the 50% reduction in benzene emissions alleged by CRA is simply due to wind speed factors.

23. Further, the NYSDEC found a similar relationship between the pre-PRV and post-PRV removal from service: a roughly 12-14% decrease in the average benzene concentration and a 7% increase in the wind speed. Accordingly, the reduction resulting from the removal of the PRV from service does not demonstrate an impact from wind speed since the wind speed was essentially the same prior to and after the removal of the PRV from service.



24. The basis for the NYSDEC's disagreement with CRA's analysis is based on empirical evidence collected during the NYSDEC's Tonawanda Community Air Quality Study and subsequent investigations. As was discussed at trial, the NYSDEC evaluated air contaminant concentrations for numerous air pollutants, including benzene, during a range of wind speed days for the study period of July 2007 through June 2008. The data showed that there was very little difference in the ambient benzene concentrations during high versus low wind speed days (9.18 miles per hour versus 3.15 miles per hour), while accounting for potential wind direction differences. In fact, the average benzene concentration was slightly higher during the high wind speed days than during the low wind speed days.

25. A follow up inspection by NYSDEC and the U.S. Environmental Protection Agency ("USEPA") in April 2009 (documented in USEPA's National Enforcement Investigations Center report) and subsequent testing identified extremely large sources of fugitive emissions from Tonawanda Coke Corporation's by-products area of the Facility. The failure of the Tonawanda Coke Corporation to conduct a proper leak detection and repair program and to properly maintain the company's leak detection program equipment to detect and repair leaks, resulted in significant emissions of coke oven gas, which contains benzene among other hazardous air pollutants. After several operational modifications were made by the Facility, pursuant to administrative orders issued by the NYSDEC and USEPA in July 2011, the monitoring data reflected an 86% reduction of ambient air benzene concentrations from the levels initially detected during the study period.

**NYSDEC's Concerns Regarding the Tonawanda Coke Corporation's  
Commitment to Environmental Compliance**

26. The NYSDEC disagrees with the statement made at page 6 of Tonawanda Coke Corporation's sentencing memorandum that the Tonawanda Coke Corporation "...dealt candidly with the NYSDEC inspectors and is a company that can and will learn from this experience and fully comply with the environmental laws and regulations in the future." As confirmed by the verdict, the Tonawanda Coke Corporation intentionally failed to advise the NYSDEC of the existence of the pressure relief valve, NYSDEC staff were not aware of the company's routine practice of mixing coal tar sludge onto the coal fields rather than the mixing pad, and NYSDEC staff were not aware that the Tonawanda Coke Corporation ignored the agency's direction regarding the installation of baffles. Further, as demonstrated by the trial testimony of the NYSDEC witnesses, inserting a vague reference to a pressure relief valve and a trivial emission rate of coke oven gas from that emission source in its July 2003 Hazardous Air Pollutant Emission Inventory report is not the requisite notice that the Tonawanda Coke Corporation was required to provide the NYSDEC regarding an unpermitted emission source.

27. The actions of the Tonawanda Coke Corporation following the issuance of the verdict in March 2013 call into question the validity of the claim in the sentencing memorandum regarding Tonawanda Coke Corporation's commitment to future environmental compliance.

**Dusty Pushes at the Facility and Citizen Complaints of Dust, Smoke and Odors**

28. Since the rendering of the verdict in March 2013, the NYSDEC has received complaints from citizens in the Tonawanda community of odors, which they attribute to the Tonawanda Coke Corporation, as well as complaints of dust and smoke at the Facility. NYSDEC staff has also observed dusty pushes at the Facility on a few occasions. A dusty push

refers to the emission of fine particles which are released when the coke is pushed out of the battery ovens.

29. It has been difficult obtaining definitive information from the Tonawanda Coke Corporation regarding the cause of the dusty pushes. Initially, the company claimed that the dusty push was the result of the use of bad coal, which did not plasticize during the coking process. In an effort to obtain further information, NYSDEC Assistant Regional Attorney Terri Mucha sent a letter to counsel for Tonawanda Coke Corporation requesting further information.

30. The Tonawanda Coke Corporation's response to that request demonstrates that the company is befuddled as to the exact cause of the dusty pushes, which it acknowledged occurred periodically in August 2013, and does not appear to be in a position to prevent another recurrence. Further, the company refused to identify the Tonawanda Coke Corporation employees in charge of purchasing coal and performing the daily laboratory analyses that the company claims to perform, as well as the individuals responsible for determining the mixture of the coal and other components to produce the requisite coke. The basis for the refusal to provide that information is that such a request is "...overly intrusive and unnecessary."

31. In addition, on September 24, 2013, NYSDEC staff observed opacity from the Facility's waste heat stack (referred to as STAC2). NYSDEC staff performed a Reference Method 9 visible emissions observation of the smoke and documented a six minute average of 32.3%. The opacity limit set forth in Tonawanda Coke Corporation's Title V permit and Part 214.6 of Title 6 of the New York Codes, Rules and Regulations is 20% for any six minute period.

**NYSDEC Staff Observations at the Facility During the  
September 11, 2013 Inspection**

32. To assist in the NYSDEC's investigation of the odor, dust and smoke complaints, NYSDEC staff performed an unannounced site inspection of the Facility on September 11, 2013. The NYSDEC staff at the inspection was discouraged by some of their observations, which again do not reflect a corporation which has learned from its mistakes and is serious about full compliance with all applicable environmental regulations.

33. September 11, 2013 was a windy day and NYSDEC staff observed a significant amount of dust (consisting primarily of coal fines, breeze and other small particles) blowing in the air, especially in the coal field area. Despite the presence of water sprinklers, they were not running and were only turned on after NYSDEC staff directed the company to do so in order to prevent the fugitive dust from traversing off-site.

34. Part of the NYSDEC's September 11, 2013 inspection also included an investigation of the ammonia still and its related equipment. These items were inspected not only as part of the investigation into the odor complaints, since prior issues with the ammonia still were the cause of past odor complaints, but also because the Tonawanda Coke Corporation identified equipment malfunctions with certain exhausters and the ammonia still as the cause of its exceedances of the cyanide limits in Tonawanda Coke Corporation's Industrial User permit #331. Such exceedances resulted in the Town of Tonawanda issuing notices of violation to the company (for both mercury and cyanide exceedances) and an administrative order, dated September 5, 2013.

35. The NYSDEC's September 11, 2013 inspection also involved a review of the Tonawanda Coke Corporation's Programmable Logic Controller ("PLC Hub"). The company was required to install the PLC Hub under the NYSDEC and USEPA Administrative Orders issued in July 2011. The purpose of the unit is to provide centralized monitoring of key operating parameters in the coke oven gas system in order to provide advance warning of potential equipment failure and/or upset conditions so employees can undertake requisite action before a failure or malfunction occurs.

36. NYSDEC staff was discouraged to observe that the PLC Hub was not fully programmed with all appropriate operating parameters, ranges and alarms into the system, necessary to provide a comprehensive centralized monitoring of the coke oven gas conveyance system and ammonia still operation. The failure to properly utilize that monitoring system precludes the company from detecting equipment problems (such as the recent equipment malfunctions attributable to the cyanide permit limit exceedances) before emergencies occur, which may result in releases of contaminants into the environment.

**Poor Standard Operating Procedures and Continued Petroleum Spills at the Facility**

37. As noted in the United State's sentencing memorandum, the NYSDEC staff inspected the Facility in November 2012 in response to a complaint of various petroleum discharges at the Facility that were neither reported to the NYSDEC as required by statute nor promptly remediated. NYSDEC staff detected several locations of petroleum discharges at the Facility and entered into a Stipulation Agreement with Tonawanda Coke Corporation for the company's remediation of the contaminated areas. The Stipulation Agreement also required Tonawanda Coke Corporation to revise its Best Management Practices plan to modify its

standard operating procedures in response to a petroleum spill and to undertake various actions to prevent future direct discharges of petroleum onto the ground. One such action involved the installation of impervious pads in the areas where the vehicles are fueled and maintained and equipment is repaired and maintained.

38. While negotiations continue to address certain deficiencies in the proposed remedial work plan, NYSDEC staff was discouraged to observe during the September 11, 2013 inspection that the company has not substantially changed its standard operating practices to prevent petroleum spills.

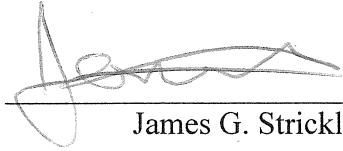
39. For instance, Tonawanda Coke Corporation has not yet installed the impervious pads as requested by the NYSDEC and it is not clear when such pads will be installed. In addition, certain equipment in uncovered exterior areas of the Facility was observed to be still leaking. While Tonawanda Coke Corporation employees had spread an absorbent material onto certain spills, since the area is not located in an enclosed area there is the potential for the petroleum discharges to disperse and migrate when they come in contact with precipitation.

**Work Performed Under the Administrative Orders Brought by the NYSDEC and USEPA**

40. Mr. Kennedy's Declaration states that the Tonawanda Coke Corporation has spent substantial funds to address the violations set forth in the Administrative Orders brought by the NYSDEC and USEPA. It should be noted, however, that a majority of the work undertaken by the Tonawanda Coke Corporation pursuant to those Administrative Orders were required by federal and/or state environmental laws. The same is true for certain future upgrades and modifications to the Facility that are still being sought in the civil context by the NYSDEC and USEPA. No final settlement agreement has been reached yet regarding the future modifications.

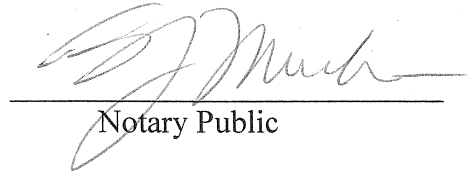
41. Based on the above, the NYSDEC has strong concerns regarding Tonawanda Coke Corporation's commitment to ensuring future environmental compliance at the Facility.

DATED: September 30, 2013



James G. Strickland

Sworn to before me this  
30th day of September 2013.

  
Notary Public

TERESA J. MUCHA  
Notary Public State of New York  
Qualified in Erie County  
My Commission Expires 7/29/14